IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

[2023] SGCAB 1

Appeal No 1 of 2021

In the matter of notice of Infringement Decision issued by the Competition and Consumer Commission of Singapore on infringement of Section 34 of the Competition Act 2004 in relation to the provision of maintenance services for swimming pools, spas, fountains and water features, CCCS 500/7003/17

Between

CU Water Services Pte Ltd

… *Appellant*

And

Competition and Consumer Commission of Singapore

… *Respondent*

DECISION

[Competition Law] – [Bid-Rigging] – [Financial Penalties] – [Base Penalty] – [Penalty Calculation Methodology]

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v
Competition and Consumer Commission of Singapore

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Competition Appeal Board — Appeal No. 1 of 2021
Andre Yeap SC, Dr Burton Ong, Tan Chuan Thye SC and Prof Julian Wright
7 February 2023

3 October 2023 Decision reserved.

Introduction

1 On 14 December 2020, the Competition and Consumer Commission of Singapore ("**CCCS**") handed down its Infringement Decision ("**ID**") against three undertakings for their participation in bid-rigging agreements and/or concerted practices in relation to the provision of maintenance services for swimming pools, spas, fountains, and water features of private property developments in Singapore. The following financial penalties were imposed on the undertakings:[1]

(a) CU Water Services Pte. Ltd. ("**CU Water**") – S$308,680;

(b) Crystalene Product (S) Pte. Ltd. ("**Crystalene**") – S$41,541; and

(c) Crystal Clear Contractor Pte. Ltd. ("**Crystal Clear**") – S$68,793.

(respectively, "**Undertaking**", and collectively, the "**Undertakings**")

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[1] ID at [259].

2 This appeal is brought by CU Water against the financial penalty imposed by CCCS, seeking a reduction of the penalty sum to a range of S$80,000 to S$100,000.[2] CU Water does not appeal against CCCS' findings on liability.

3 We are told by CCCS that the preponderance of infringements in this case is unprecedented in the course of CCCS's work – the infringing conduct spanned close to a decade, with no less than 521 discrete incidents of bid-rigging (affecting at least 220 developments).[3] The financial penalty imposed would have been significantly higher but for the statutory maximum penalty allowed under s 69(4) of the Competition Act 2004 (2020 Rev Ed) (the "**Act**").

4 Having carefully considered the evidence and the parties' submissions, we dismiss the appeal. We set out the reasons for our decision in these grounds.

Background facts

5 The background facts have been set out in considerable detail in the ID. We adopt the facts described therein and reference only those salient to this appeal here.

Infringing conduct of the Undertakings

6 The Undertakings provide maintenance services for swimming pools, spas, fountains, and other water features in privately-owned property developments, including condominiums and hotels. These maintenance services

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2 Appellant's Submissions dated 29 November 2021 ("**Appeal Submissions**"), para 66.

3 Respondent's Submissions dated 15 August 2022 ("**CCCS' Submissions**"), para 1; see also Respondent's Skeletal dated 7 February 2023 ("**CCCS' Skeletal**") at para 2.

typically include the repair, replacement and maintenance of water pumps, water filtration devices, drain covers and lights used in swimming pools, spas, fountains, and other water features. Maintenance services can also include cleaning services for swimming pools, spas, fountains, and water features.[4]

7 Vendors such as the Undertakings are typically engaged for their services by participating in tenders called by the management corporation or managing agent for a particular condominium or hotel. As most developments already have an incumbent vendor who periodically provides maintenance services, the management corporation, managing agent or hotel may decide to ask the incumbent vendor to put in a bid for the tender and in some circumstances, ask the incumbent vendor to assist in obtaining additional bids for the tender. Procurement requirements frequently ask for a minimum of three bids before a tender is awarded to the selected vendor.[5]

8 The evidence obtained by CCCS during the course of the investigation showed collusive tendering or bid-rigging between CU Water and Crystalene, and between CU Water and Crystal Clear.[6]

9 The infringing conduct is generally characterised by an Undertaking requesting a supporting quote (*ie*, the Requesting Party), followed by the Undertaking receiving the request (*ie*, the Requested Party) providing a quotation to the customer that is, to the Requested Party's belief, higher than the Requesting Party's quotation given to the customer. Most times, the Requesting Party would specify a price for the Requested Party to use in its quotation, and

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4 ID at [4].

5 ID at [6].

6 ID at [74].

this specified price would, to the belief of both parties, be higher than the Requesting Party's own quotation given to the customer. This formed the large majority of the bid-rigging incidents between CU Water and Crystalene, as well as between CU Water and Crystal Clear.[7]

10 The infringing conduct also involved market sharing of customers where each Undertaking in their respective bilateral agreements agreed or understood not to compete for the other Undertaking's customers in tender bids when that Undertaking was the incumbent contractor. There were some bid-rigging incidents where an Undertaking knew or verified that another was the incumbent Undertaking at a particular development. The first Undertaking would approach the incumbent and seek instructions on the price to quote. The incumbent (*ie*, the Requesting Party) in most instances would respond on how much to quote and the first Undertaking (*ie*, the Requested Party) would then follow up by submitting a quotation it believes to be higher than the incumbent's quotation to the customer.[8]

11 The CCCS was satisfied that the Undertakings had infringed s 34 of the Act,[9] which prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

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7 ID at [75].

8 ID at [76].

9 ID at [139].

12 The factual findings and conclusions on liability by CCCS are not in dispute in these proceedings. What is on appeal is the financial penalty that was imposed on CU Water.

Financial penalty imposed by CCCS

13 In determining the penalty to be imposed, CCCS applied the six-step framework set out in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 (the "**Penalty Guidelines**").

14 The Penalty Guidelines provide that in imposing any financial penalty, CCCS pursues the following twin objectives: (a) to impose penalties on undertakings which reflect the seriousness of the infringement, and (b) to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings from engaging in anti-competitive practices. The following six-step framework is adopted:

(a) Step 1: calculation of base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the undertaking's turnover of the business in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the year when the infringement ended ("**Relevant Turnover**");

(b) Step 2: adjustment for the duration of the infringement;

(c) Step 3: adjustment for aggravating or mitigating factors;

(d) Step 4: adjustment for other relevant factors, *eg* deterrent value. We note here that paragraphs 2.17 and 2.18 of the Penalty Guidelines

explicitly contemplate only an upwards adjustment to the penalty imposed on an infringing undertaking, focusing on the CCCS' interest "in particular, to deter the undertakings concerned as well as other undertakings from engaging in anti-competitive practices";

(e) Step 5: adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded; and

(f) Step 6: adjustment for immunity, leniency reductions and/or fast track procedure discounts.

(hereinafter referred to as the "six-step penalty framework")

15 In the present case, CCCS' conclusions on the financial penalty imposed on CU Water can be summarised as follows:

(a) Step 1: CCCS considered the seriousness of the infringement (including the nature of the product, structure of the market, and the potential effect of the infringements on customers, competitors and third parties) and fixed the starting point at 9% of the Relevant Turnover.[10] Having assessed CU Water's turnover for the financial year preceding the date when the infringement ended, CCCS fixed the base penalty at S$[…].[11]

(b) Step 2: CCCS applied a duration multiplier of one year for the first bid-rigging infringement incident.[12]

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10 ID at [176].

11 ID at [221].

12 ID at [222].

(c) Step 3: CCCS considered the multiple infringing incidents by CU Water as an aggravating factor. A multiplier of […]% was set for each additional infringing act. According to CCCS, the numerical value of the multiplier was based on CCCS' discretion in the present case (previous decisions had used a higher multiplier of 10%).[13] As CU Water was involved in at least 521 bid-rigging infringements, it was appropriate to increase the penalties by […]% (*ie*, 520 additional infringing incidents x […]%).[14] That said, CCCS considered that CU Water had sufficiently co-operated with CCCS during the course of investigations and therefore reduced the base penalty by […]%.[15] Accordingly, the financial penalty was increased by 2590% (*ie,* 2600% - […]%) to S$[…].[16]

(d) Step 4: CCCS considered that no further adjustments were warranted at this stage and determined that the applicable financial penalty was S$[…].[17] In reaching this conclusion, CCCS had considered various arguments raised by CU Water including, the size and financial position of CU Water and the impact of the COVID-19 pandemic on its business.[18]

(e) Step 5: As the financial penalty exceeded the maximum penalty that CCCS can impose in accordance with section 69(4) of the Act, the

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13 ID at [230].

14 ID at [224].

15 ID at [223].

16 ID at [225].

17 ID at [243] and [251].

18 ID at [245].

financial penalty was adjusted downwards to S$[…] (*ie*, 10% of the turnover of the business of the undertaking in Singapore for each year of infringement).[19]

16 For completeness, Crystalene and Crystal Clear had applied for leniency and signed Fast Track Agreements with CCCS.[20] CU Water did not apply for leniency.[21] CCCS considered it appropriate to grant leniency to Crystalene and Crystal Clear in view of the sufficiently useful information and cooperation rendered, and accordingly imposed the lower financial penalties on each Undertaking respectively.[22]

Grounds of CU Water's appeal

17 In this appeal, CU Water submits that the penalty of S$308,680 is disproportionate to the seriousness of the infringement and manifestly excessive as deterrence,[23] and should be adjusted downwards to an amount in the range of S$80,000 to S$100,000.[24] Specifically, CU Water appeals against CCCS' analysis of Steps 1, 3, 4, and 5 of the Penalty Guidelines.

18 We found CU Water's submissions to be scattered at points (and not all were seriously pursued); in the end it appeared to us that the common thread underpinning CU Water's case was that the financial penalty imposed against it

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19 ID at [253].

20 ID at [201]–[202] and [214]–[215].

21 ID at [257].

22 ID at [201], [203], [214] and [216].

23 Appeal Submissions, para 5.

24 Appeal Submissions, para 66.

was disproportionate and should be reduced. The principal grounds of CU Water's appeal are summarised as follows:

(a) As a starting point, Penalty Guidelines are not binding and should be used to merely guide the computation of the appropriate amount. The Competition Appeal Board (the "**Board**") has the jurisdiction to assess the penalty imposed on its own terms, having regard to the justice of the case.[25]

(b) At Step 1 of the Penalty Guidelines, CCCS erred in fixing the starting percentage at 9% of the relevant turnover in assessing the seriousness of the infringement; this figure appears to be arbitrarily arrived. A starting percentage of 4% to 5% ought to have been used instead.[26]

(c) As regards Step 3 of the Penalty Guidelines, the methodology adopted by CCCS in applying the relevant multiplier to each discrete incident offends the totality principle and principle of proportionality as applied in criminal sentencing cases.[27] In addition, the manner in which CCCS had given mitigating value for CU Water's cooperation in investigations is inconsistent with how mitigation is considered in criminal prosecutions.[28] Further, CU Water ought to be regarded as

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25 Appeal Submissions, para 4; Transcript of the Appeal Hearing on 7 February 2023 ("**Transcript**"), p 6 (ln 14–19).

26 Appeal Submissions, paras 7 and 19.

27 Appeal Submissions, para 38.

28 Appeal Submissions, para 20 and 22.

belonging to an industry of high turnover and low margin for which a reduction in the penalty is warranted.[29]

(d) As regards Step 4 of the Penalty Guidelines, CCCS failed to comprehensively consider the size and financial position of CU Water as it did not accord any weight to the net profit / losses of the Undertaking. Accordingly, CCCS failed to make the appropriate downward adjustments to the penalty sum arrived at after Step 3, which was excessively disproportionate to CU Water's financial position.[30]

(e) In the final analysis, CCCS had relied on the statutory maximum under section 69(4) of the Act in determining the amount of the penalty. CU Water's contention is that s 69(4) of the Act does not make it mandatory for financial penalties to be capped at 10% and should instead be interpreted as giving the authority a discretion to impose financial penalties in the range of 1% to 10% of the total turnover.[31] Drawing analogy from criminal case law, CU Water contends that maximum "sentences" are reserved for the most egregious of scenarios and that CU Water's conduct can hardly be said to be the most egregious on the scale of severity even on CCCS' assessment.[32] Against the foregoing, CU Water urges this Board to exercise its discretion to adjust the penalty downwards as appropriate to achieve the policy objectives of the Act and yet strike a balance with proportionality of the penalty. CU Water

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29 Appeal Submissions, para 23.

30 Appeal Submissions, para 46.

31 Amended Notice of Appeal dated 28 January 2022 ("**ANOA**"), paras 64–66; see also Appeal Submissions, para 59.

32 Appeal Submissions, para 62.

contends that a final penalty within the range of S$80,000 to S$100,000 is appropriate.[33]

Our decision

19 Although the Board is statutorily empowered to make its own decision on the appropriate penalty that should ultimately be imposed on infringing parties, it should be mindful that it should not turn itself into a primary decision maker without good reason. The Board is essentially an appellate tribunal and not a tribunal of first instance. The primary task is usually to decide whether CCCS was correct in arriving at the conclusion that it did: see *Gold Chic Poultry Supply Pte. Ltd. and others v Competition and Consumer Commission of Singapore* [2020] SGCAB 1 ("***Gold Chic***") at [87(f)].[34]

20 In imposing a financial penalty, CCCS follows and applies the Penalty Guidelines. However, the Board is not bound by the Penalty Guidelines, which as the name suggests, are merely guidelines and not statute. The Board has jurisdiction to assess the penalty imposed, on its own terms, having regard to the justice of the case: *Gold Chic* at [301].[35] That said, the Board will have regard to the Penalty Guidelines where appropriate in reaching its conclusion, unless it is shown that the Penalty Guidelines are wrong in principle or that the CCCS has erroneously applied the Penalty Guidelines: *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium*

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33 Appeal Submissions, para 66.

34 Agreed Bundle of Authorities ("**ABA**") Vol 2, Tab 11.

35 ABA Vol 2, Tab 11.

Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd [2011] SGCAB 1 at [144].[36]

21 The crux of this appeal requires the Board to consider whether the overall penalty imposed is appropriate for the infringement in question, considering the twin objectives of punishment and deterrence (set out at paragraph 1.7 of the Penalty Guidelines, in which CCCS has declared that the quantum of penalties imposed must "reflect the seriousness of the infringement" and "ensure that the threat of penalties will deter both the infringing undertakings and other undertakings from engaging in anti-competitive practices"). It is the overall justice and proportionality of the penalty that should be considered. As a corollary, there ought not to be an examination of the individual steps applied under the Penalty Guidelines in minute detail. The imposition of the financial penalty is not a scientific exercise, nor is it capable of being reduced to a mechanical calculation according to a predetermined mathematical formula. Instead, while the Penalty Guidelines provide an objective basis upon which calculations of financial penalty should be carried out, the practical application of the framework requires some measure of judgment depending on the precise factual matrix of an individual case. In this regard, a margin of appreciation should be granted to CCCS in its determinations on the imposition of financial penalties as long as the Board is satisfied, on the whole, that the penalty imposed is just and proportionate: *IPP Financial Advisers Pte Ltd v Competition Commission of Singapore* [2017] SGCAB 1 ("***IPP Financial Advisers***") at [26];[37] *Uber Singapore Technology*

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36 ABA Vol 12, Tab 67.

37 ABA Vol 12, Tab 63.

Pte Ltd and others v Competition and Consumer Commission of Singapore [2020] SGCAB 2 at [191].[38]

22 For the reasons that follow, CU Water did not demonstrate to the Board that: (a) the legal principles used by CCCS in its penalty calculation framework were flawed, or (b) that the CCCS had made any errors which would have materially changed the outcome; neither did CU Water advance a materially different alternative penalty framework to be applied to the present case which would have yielded a different result. In the final analysis, the Board was not satisfied that the financial penalty imposed by the CCCS should be adjusted.

Step 1: Calculation of base penalty

23 We start with the base penalty.

24 In the ID, CCCS considered it appropriate to fix the starting point at 9% of the Relevant Turnover of the Undertakings, having regard to the nature of the product, the structure of the market, the likely market shared by the Undertakings, the potential effect of the infringements on customers, competitors and third parties, and that bid-rigging is one of the more serious infringements of the Act.[39]

25 CU Water submits that CCCS, in arriving at a starting percentage of 9%, had erred in its assessment of the seriousness of the infringement. In particular:

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38 ABA Vol 14, Tab 87.

39 ID at [176].

(a) The starting percentage adopted by CCCS is excessive in the light of past cases.[40] In *Kier Group Plc and others* [2011] CAT 3 ("***Kier***"),[41] the UK Competition Appeal Tribunal ("**CAT**") had adopted a starting point of 3.5% for a case of "simple" cover pricing.[42] CCCS (or its predecessor, the Competition Commission of Singapore ("**CCS**")) had also used lower starting percentages in *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles* (CCS 500/003/10) ("***Motor Vehicle Trades***"),[43] a case on bid-rigging, and *Bees Work Casting Pte Ltd and others v The Competition Commission of Singapore* [2013] SGCAB 1 ("***Bees Work***"), a case on price-fixing.[44]

(b) The size of each contract was small and not substantial, the majority being below S$5,000 with the lowest being S$240 and the highest being S$29,500.[45]

(c) The market share of the Undertakings was insignificant.[46]

(d) The real and actual effect of the conduct was also not significant. Out of 274 incidents, CU Water was unsuccessful in winning the bid for about one-third of the time. The anti-competitive collusive effect of the

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40 Appeal Submissions, paras 16–19; see also Transcript, p 7 (ln 17) – p 10 (ln 7) and p 17 (ln 2–16).

41 ABA Vol 2, Tab 12.

42 Appeal Submissions, paras 16–19.

43 ABA Vol 13, Tab 80.

44 ABA Vol 1, Tab 6.

45 Appeal Submissions, para 10.

46 Appeal Submissions, para 12.

support bids did not lead to CU Water being inevitably awarded the contract.[47]

(e) In the circumstances, a starting percentage of 4% to 5% should have been adopted instead.[48]

26 The focus of CU Water's contentions is on CCCS' assessment of the seriousness of the infringement (*ie*, the starting percentage of 9%) and not its determination of the Relevant Turnover. The central question is whether CCCS was right in applying a 9% starting percentage.

Discussion on the starting percentage and the nature of the infringement

27 Section 34 of the Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they are excluded or exempt in accordance with the provisions of Part 3 of the Act. In the case of agreements involving restrictions of competition by object (or "object" infringements), such as price fixing, bid-rigging, or market sharing, CCCS regards such agreements as always having an appreciable adverse effect on competition, even if parties to such agreements are small or medium sized enterprises: see paragraph 2.24 CCCS Guidelines on the Section 34 Prohibition ("**Section 34 Prohibition Guidelines**").

28 In this regard, CCCS in its Penalty Guidelines specify that serious infringements of the section 34 prohibition include, market-sharing and bid-

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47 Appeal Submissions, para 15.

48 Appeal, Submissions, para 19.

rigging and that the more serious and widespread the infringement, the higher the starting percentage point is likely to be: see paragraph 2.3 of the Penalty Guidelines.

29 We understood from CCCS that for infringements of the present nature, a starting percentage of 9% is generally adopted as a matter of policy to reflect the severity of the infringement.[49] According to CCCS, "object" infringements in the nature of bid-rigging and price fixing are serious infringements which will always have an appreciable adverse effect on competition and thus warrant a base penalty on the higher end of the scale.[50]

30 CU Water, however, referred us to the starting percentages in past cases, contending that the starting percentage of 9% is excessive and not in keeping with precedent: see paragraph 25(a) above.

31 We start with the CAT's decision in *Kier*.[51]

32 *Kier* was a case where the majority of the infringements in question involved what was described as "simple" cover pricing: at [3]. The UK Office of Fair Trading ("**OFT**") (the predecessor of the Competition and Markets Authority ("**CMA**")) had conducted an extensive investigation which took place over some five and a half years into an endemic practice of cover pricing in the construction industry in England. In the penalty assessment, the OFT set the starting percentage at 5% of an undertaking's relevant turnover for all infringements involving "simple" cover pricing: at [41]. On appeal, the CAT

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49 Transcript, p 74, ln 14–18.

50 CCCS' Submissions, paras 22–23.

51 ABA Vol 2, Tab 12.

regarded the starting percentage of 5% as excessive given the nature of infringement together with the harm "simple" cover pricing is likely to cause – noting that the harm is likely to be small by comparison to hard-core cartels – and the general uncertainty and ambivalence as to the legitimacy of the practice which existed for at least 4 years. The CAT therefore adopted a starting percentage of 3.5%: at [100]–[108] and [115].

33 Before us, CU Water sought to argue that its infringing conduct should be considered as "simple" cover pricing, which warrants a lower starting percentage, and cited the following passage in *Kier* (at [100]):[52]

> … All that being said, it also needs to be recognised that "simple" cover pricing is a bilateral arrangement in the context of a multi-partite tendering exercise. Its purpose is not (as in a conventional price-fixing cartel) to prevent competition by agreeing the price which it is intended the client should pay. Indeed, its purpose is quite the reverse, namely to identify a price which the client will not be willing to pay. Nor is its purpose to reach an agreement that the recipient of the cover price will cease to be a contender – it is strongly argued by the Present Appellants, and not disputed by the OFT, that in a case of "simple" cover pricing the recipient has already made its own unilateral decision not to compete for the work before the request for a cover price is made.

34 CU Water repeated the points it had made to CCCS in its written representations, and referred to parts of the evidence regarding its arrangements with Crystalene or Crystal Clear as reproduced at paragraphs 82, 92 and 101 of the ID.[53] According to CU Water, its request for a supporting quote identifying a price which the client will not be willing to pay and the Receiving Party's

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52 Appeal Submissions, paras 16 and 18.

53 Appeal Submissions, para 17; see also CU Water's Reply Submissions dated 4 July 2022 ("**CU Water's Reply Submissions**"), para 12.

unilateral decision not to compete for work before the request for a cover price is made are the elements of "simple" cover pricing in this case.[54]

35 We did not find *Kier* to be applicable as the infringing conduct did not fall within the definition of "simple" cover pricing as set out in the case.

36 In *Kier*, "simple" cover pricing was defined in the following terms (at [3]):

> "Simple" cover pricing occurs where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price.

37 As can be seen from the passage above, "simple" cover pricing involves particular factual circumstances surrounding the provision of a cover quote by a Requested Party. It refers to a situation where a Requested Party has no desire to compete but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. At the request of another bidder who does want to win the tender, the Requested Party provides a cover price to which it thinks would not win the contract. This is done with

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[54] Appeal Submissions, para 17.

the view of preserving the requested bidding party's opportunities to participate in future tender exercises.

38 In contrast, the CAT recognised that the practice of "simple" cover pricing was materially distinct from bid-rigging as ordinarily understood. According to the CAT, bid-rigging implies an agreement or arrangement which determines, or assists in the determination of, the price which will actually be charged to the customer (at [94]):

> There is no doubt that "simple" cover pricing constitutes an infringement of the Chapter I prohibition, but in our view the practice is materially distinct from "bid rigging" as ordinarily understood. Bid rigging implies an agreement or arrangement which determines, or assists in the determination of, the price which will actually be charged to the purchaser. Cover pricing is less serious than conduct of that kind.

39 Here, and as was noted in the ID, in a majority of the incidents, the Requesting Party (including CU Water) who wished to win the contract had arranged for its competitors to submit bids and specified the price it wanted the Requested Party to quote so as to increase the chances of winning the contract.[55] To the extent that CU Water was the Requested Party, CCCS had found that the infringing conduct of the Undertakings also involved market sharing of customers in which there was at least a concerted practice or an implied agreement where the Undertakings understood not to compete with the incumbent contractor.[56] Such conduct falls within the ambit of bid-rigging and not "simple" cover pricing as described in *Kier*.

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55 ID at [75] and [172].

56 ID at [76] and [169].

40 Moreover, in *Kier*, the CAT observed that the practice of cover pricing in the industry was motivated by a genuine and widespread perception that if a company did not participate in a tender process when invited to do so it ran the risk of exclusion from tender lists, and that in certain cases this risk had materialised: see *Kier* at [103]. There was no evidence that the Undertakings had engaged in the infringing conduct because of a fear of exclusion from future tenders.[57] We therefore did not consider it appropriate to seek guidance from the starting percentage adopted in *Kier*.

41 CU Water referred to two other cases.

42 The first was *Bees Works*,[58] which concerned modelling agencies that had been found to engage in price-fixing. In summarising CCS' decision, the Board noted that CCS had initially proposed a starting percentage of […]% of the relevant turnover for each of the parties in its Preliminary Infringement Decision. Subsequently, after taking into consideration the circumstances of the case, including the nature of the industry and the representations made by the parties, CCS reduced the starting percentage to […]%: at [38].

43 The second was CCS' decision in *Motor Vehicle Traders*.[59] There, CCS was concerned with bid-rigging in public auctions of motor vehicles. The CCS had fixed the starting point at […]% of the relevant turnover for each of the parties in that case:[60] see summary of CCS' infringement decision in the appeal

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57 ID at [173].

58 ABA Vol 1, Tab 6.

59 Transcript, p 17; see also ABA Vol 13, Tab 80.

60 Transcript, pp 71–73.

decision of *Pang's Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1 ("***Pang's Motor Trading***") at [16].[61]

44 While the shift from the starting percentages employed in previous cases is discernible, CCCS pointed out that since *Bees Works* and *Motor Vehicle Trades*, in 2011 and 2013 respectively, CCCS has adopted a general policy position that bid-rigging and other cases involving obvious cartelistic behaviour are serious infringements which would attract a higher starting point. CCCS considers that there is now sufficient market awareness of the harm to competition by such conduct.[62] Consequently, CCCS has in its more recent decisions on bid-rigging employed a starting percentage of […]% : see *eg*, *Bid-rigging in Electrical Services and Asset Tagging Tenders* (CCS 700/003/15) at [249] and *Bid-rigging of Building Construction and Maintenance Tenders* (CCCS 500/7003/16) at [145].[63]

45 This is an understandable shift in policy, which is consistent with the deterrence objective of financial penalties imposed on parties who have committed such serious infringements of the section 34 prohibition. It is CCCS's role to promote competition in the public interest and it should have the ability to adjust the starting percentages for conduct it considers to be most harmful to competition. The reason provided – that there is sufficient awareness that such conduct is harmful such that an enterprise engaging in the conduct can expect to be seriously sanctioned – is justifiable as a matter of Singapore's maturing competition enforcement policy. A direct comparison to older

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61 ABA Vol 13, Tab 71.

62 Transcript, pp 75–76.

63 CCCS' Submissions, para 23; see also ABA Vol 6, Tab 47; ABA Vol 6, Tab 48.

decisions may not always be appropriate. CCCS is entitled to take a policy stance that big-rigging conduct is a serious infringement deserving of a base penalty that is on the higher end of the scale.

46 We further note CCCS' submission that starting percentages on the higher end of the spectrum are typically used by other competition regulators for serious types of infringements including price-fixing and market sharing.

47 For instance, the UK's CMA will generally use a starting point between 21% and 30% of the relevant turnover for the most serious types of infringements, that is, those which the CMA considers are likely by their very nature to harm competition the most. These include cartel activities such as price-fixing and market sharing: see the CMA's penalty guidance released in December 2021 (the "**CMA Penalty Guidance**") at paragraph 2.5. Less serious object infringements or infringements by effect have a starting point between 10% and 20%: see paragraph 2.5 of the CMA Penalty Guidance.

48 Similarly, the European Commission's ("**EC**") Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (1 September 2006) ("**EC Method of Fining**") notes that horizontal price-fixing, market-sharing, and output-limitation agreements, which are usually secret, are by their nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale. In this regard, the proportion of the value of sales taken into account to determine the basic amount of fine will as a general rule be set at a level of up to 30% of the value of sales: see EC Method of Fining at paras 19 to 23.

49 While CU Water accepts that bid-rigging by agreement is by its nature restrictive of competition, it seeks to argue that where it can show that the real and actual effect of the conduct is not significant, this should be given due weight. CU Water contends that its conduct did not in fact lead to its being inevitably awarded contracts. According to CU Water, it was successful in its bids in only slightly more than two-thirds of the time.[64]

50 The starting point is paragraph 2.22 of the Section 34 Prohibition Guidelines, which states:

> … *Once it has been established that an agreement has as its object the appreciable restriction of competition, CCCS need not go further to demonstrate anti-competitive effects*. On the other hand, if an agreement is not restrictive of competition by object, CCCS will examine whether it has appreciable adverse effects on competition.
>
> [emphasis added]

51 Pursuant to the Section 34 Prohibition Guidelines, in determining if an agreement is anti-competitive, CCCS need not go further to demonstrate anti-competitive effects once it has been established that an agreement has as its object the appreciable restriction of competition. It follows that the CCCS is entitled to come to a view of the seriousness of bid-rigging based on its *likely effects*, as it did in this case, and is not obliged to investigate the actual effect of the infringement on competition.

52 At the hearing, CCCS submitted that for "by object" infringements, there is considerable difficulty in meaningfully and objectively assessing the actual effects of the conduct in question. According to CCCS, while not ruling

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64 Appeal Submissions, paras 13 and 15.

out the relevance of effect of conduct on a market in the appropriate case, it was irrelevant for Step 1 of the analysis in this case.[65]

53 We accept CCCS' assessment and see no basis to depart from rationale underpinning paragraph 2.22 of the Section 34 Prohibition Guidelines. Indeed, in *Barrett and Others v Office of Fair Trading* [2011] CAT 9,[66] the CAT expressed the following views as regards the OFT's assessment of infringement by object in the context of cover pricing arrangements (at [88]):

> We have noted at paragraph 23 above that the OFT is required by the 2004 Guidance to take into account, inter alia, the effects of an infringement in its assessment of the seriousness of an infringement when it determines the starting point for the financial penalty (paragraph 2.5). However, *in our view, this does not mean that the OFT is required to determine the actual effects of an infringement when assessing penalties. The Decision was based on an assessment that the cover pricing arrangements were infringements "by object" (Decision/V.8 (p. 1623)). It follows that, for the purposes of paragraph 2.5 of the Guidance, the OFT was entitled to come to a view of the seriousness of cover pricing based on its likely effects, as it clearly did at Decision/IV.68 (p. 410)*. Accordingly, the absence of evidence of actual effects in relation to a particular infringement is not, in our view, a mitigating factor.
>
> [italics added]

54 Similarly, in a more recent decision, the CAT in *FP McCann Limited v Competition and Markets Authority* [2020] CAT 28 ("***FP McMcann***") took the view that when fixing a penalty for an "object" infringement, the CMA is entitled to have regard to the likelihood of harm resulting from the infringement and reiterated that the CMA is entitled to fix a penalty for an "object" infringement without knowing whether the infringement did or did not have an

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65 Transcript, p 92 (ln 16–24), p 93 (ln 4–6).

66 ABA Vol 6, Tab 46.

adverse effect on competition. The CAT went further to elaborate that there is good reason for this being the position. A restriction by object is an infringement irrespective of the effects of the infringement. An inquiry into the effects of a restriction by object may involve very considerable investigation and evidence gathering, and be very time consuming. Such an inquiry may be considered to be unnecessary where there is an object infringement. At the stage of fixing the penalty, the CMA is entitled to take the view in an appropriate case that the infringement by means of a restriction by object is a very serious infringement and fix the penalty accordingly: at [114]–[115].[67]

55 We note that in *FP McCann*, the CAT did qualify its decision by stating that if the CMA is proposing to fix a penalty without knowing whether the restriction by object has an adverse effect on competition, and evidence is given to the CMA that the cartel did not have an adverse effect on competition, the CMA ought to consider the appropriate response to that evidence. If the evidence is clear, then the CMA ought to make a finding in accordance with that evidence. But the CAT was also careful to acknowledge that if the evidence were not clear and, in particular, would require considerable investigation, then the CMA may take the view that it can fix a penalty on the basis that it does not know whether the cartel did or did not have an adverse effect on competition: at [117].

56 We agree with CCCS' reasoning in its ID that the mere fact that CU Water was not awarded a tender for which it had requested and received supporting quotes from the other Undertakings does not mean that the conduct

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67 ABA Vol 12, Tab 59.

had no adverse effect on the process of competition.[68] Once the Undertaking engaged in bid-rigging agreement and/or concerted practice, the anti-competitive harm includes: giving customers a false sense of competition in their procurement process, reducing the number of competitive bids submitted to the customer, preventing other suppliers wishing to place competitive bids from doing so, and depriving the customer of the chance to search for more competitive bids. It also deprived the customer from receiving a more competitive bid from the Undertaking who requested for support quote(s) as, but for the bid-rigging and/or concerted practice, there would have been a more competitive bidding environment. Regardless of whether the customer had a preference for a particular supplier, competition would have been adversely affected by the Undertakings' conduct.[69] The fact that CU Water was successful in only slightly more than two-thirds of the time is not in and of itself evidence that the infringements did not have an adverse effect on competition.

57 At the hearing, counsel for CU Water highlighted that in *Bees Works*,[70] CCS had specifically found that the price of modelling services for a fashion show increased by 60% from 2005 to 2009 as a result of the price-fixing agreement between the parties in that case: see at [37]. In contrast, CCCS did not find that the Undertakings' conduct had caused the price of contracts in the relevant market to increase.[71] The argument appears to be that this warrants a reduction in the starting percentage. For the reasons above, CCCS was entitled to come to a view of the seriousness of bid-rigging based on its likely effects.

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68 ID at [165].

69 ID at [165].

70 ABA Vol 1, Tab 6.

71 Transcript, p 10 (ln 8–16).

The absence of a finding by CCCS on the effect of the infringements on prices in the relevant market does not by itself mean that the seriousness of infringement is diminished.

Structure of the market and market share of CU Water

58 Next, CU Water contends that CCCS had failed to accord sufficient weight to the Undertakings' insignificant market share despite CCCS accepting (at [161] of the ID) that the Undertakings were unlikely to hold significant market share individually or collectively.[72] Thus, the seriousness of the infringement ought to be regarded as lower than how had been characterised in the ID.

59 The various considerations that feed into the Step 1 analysis cannot be viewed in silos from each other. The seriousness of an infringement is a holistic assessment considering all circumstances of the case, which include the nature of the product, the structure of the market, the market share of the infringing parties and the effect of the infringements on customers, competitors and third parties: see paragraph 2.4 of the Penalty Guidelines. It is not a closed list. Oftentimes these considerations overlap and the analysis shade into one another. It is not useful to isolate and cherry-pick parts of the analysis.

60 The significance of the Undertakings' market share must be considered in the light of other considerations such the overall features and structure of the market. As CCCS notes in its ID, customers typically receive a limited number of quotations for their tenders as they rarely would source for more than the

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[72] Appeal Submissions, para 12.

minimum number of quotes required.[73] Thus, even though there may be many competitors available in the market, they may not necessarily be considered in practice. Furthermore, the industry is generally characterised by incumbency where customers are unlikely to change their maintenance service provider. Indeed, some of the customers that CCCS had reached out to have had the same maintenance providers for more than six years.[74] This is in part due to procurement policies that favour incumbency, such as reimbursement for good performance and priority consideration of incumbent maintenance providers.[75] Thus, even though the Undertakings may only make up a small portion of the market, the harm caused could still be substantial.

61 In this regard, counsel for CU Water contended that CCCS had placed undue weight on the feature of incumbency as incumbency is present in many other industries. The argument as developed appears to be that incumbency should be regarded as a neutral factor and that incumbency alone would not have been able to justify CCCS' conclusion on the seriousness of the infringement.[76]

62 We disagree. Incumbency is not invariably a feature of every industry or market – much will depend on the prevailing practice of the market and the nature of the product. Thus, the fact that incumbency is a feature of a particular industry or market cannot be ignored. In this regard, we do not consider CCCS to have placed undue emphasis on the feature of incumbency. CCCS had considered incumbency in the light of its own position that the Undertakings

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73 ID at [161].

74 ID at [161].

75 ID at [161].

76 Transcript, p 24 (ln 13) – p 26 (ln 14), and p 28 (ln 23–30).

were unlikely to hold significant market share, either individually or collectively, and reached a reasoned conclusion that the insignificance of the Undertakings' market share would not have sufficiently mitigated the likely harm given the feature of incumbency in the market: see [161] of the ID.

Nature of the product and size of the contracts

63 CU Water further contends that CCCS had omitted to recognise that, in the incidents that were affected by its conduct, the size of the contracts were small and not substantial. In this regard, CU Water tendered a list of bid tenders where it was eventually awarded contracts and submitted that the majority of the contract prices were below S$5,000 with the lowest value of an affected contract being S$240 and highest being S$29,500.[77]

64 The focus on contracts that were eventually awarded as opposed to the tenders that were affected by its anti-competitive behaviour is misplaced, as already elaborated at paragraph 56 above. Bid-rigging agreements and/or concerted practices involving price fixing and market sharing are by their nature injurious to the proper functioning of normal competition. There is no logical reason to make a distinction between tenders awarded and those not awarded as both were affected by the bid-rigging behaviour. Hence, the fact that the CU Water was not awarded a tender for which it had requested and received support quotes from the other Undertakings does not mean that its conduct had no effect on the process of competition.

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[77] Appeal Submissions, para 10; see also Agreed Bundle of Documents ("**ABD**") Vol 1, Tab 1.

65 As can be seen from the annexes to the ID detailing the tenders affected by the Undertakings' conduct, there were tenders (similarly involving repair works) that were more than ten times in value than the S$29,500 figure cited by CU Water. For instance, in relation to a tender for tiling works, Crystalene had provided a quote of S$[…], and Crystal Clear had provided a quote of S$[…], to CU Water.[78] Hence, CU Water's claim that the highest contract price for tenders that were affected by its conduct was S$29,500 must be rejected.

66 As to CU Water's position that the majority of the contracts were of a value less than S$5,000, it appears that CU Water had focused on the value of repair contracts and less so on the value of maintenance contracts. It will be noted that these two types of contracts are of different nature and scope – repair contracts tending to be *ad hoc* whereas maintenance contracts tending to extend for a contractually-stipulated tenure. The vast majority of customers that responded to CCCS during investigations indicated that they only required maintenance services.[79] As CCCS submits, on CU Water's own tabulation of contracts that it was awarded, the full value of maintenance contracts well exceeded that of repair contracts, and in some cases, by a significant margin.[80] The Board is not persuaded that the majority of the contracts, when assessed holistically, were of a value less than S$5,000.

67 CU Water had also sought to contrast the value of the contracts discussed in other cases (*eg*, the CCS's decision in *Collusive Tendering (Bid-Rigging) in Electrical and Building Works* (CCS 500/001/09) and the OFT's

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78 ID at Annex B3, S/N 33.

79 CCCS' Submissions, paras 34–35.

80 ABD Vol 1, Tab 1; see also CCCS' Submissions, para 34.

decision in *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*) with the value of the contracts at hand to suggest that its conduct was not as serious as portrayed by CCCS.[81] CU Water has not, however, shown how the comparison is appropriate. Each case turns on its own facts, in particular the market concerned.

68 In the light of the foregoing, we were not satisfied that there were grounds to adjust the starting percentage of 9%. As CU Water does not take issue with CCCS' determination of the Relevant Turnover, we will proceed on the basis of S$[…] as the base penalty.

Observations on proportionality

69 As mentioned at the start of this decision, the preponderance of infringements in this case is unprecedented in the course of CCCS's work – the infringing conduct spanned close to a decade, with no less than 521 discrete incidents of bid-rigging (affecting at least 220 developments).

70 Cases involving significant numbers of infringements present a particular challenge as each additional infringing incident cannot be ignored and ought to be reflected in determination of the penalty. In some cases, the sheer number of infringements may result in substantial penalties. In this case, CCCS applied a percentage multiplier to each additional infringing incident and arrived at a seven-figure financial penalty prior to the adjustment under s 69(4) of the Act. The eventual penalty imposed was far lower only because of the maximum penalty permitted by statute.

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[81] Appeal Submissions, paras 8–10.

71 Given the foregoing, it is unsurprising that proportionality featured prominently in CU Waters' submissions in this appeal, appearing in submissions at different junctures of the six-step penalty framework.

(a) At Step 3 (adjustment for aggravating and mitigating factors), CU Water contends that the multiplier methodology offends the principle of proportionality and more specifically, the totality principle as applied in criminal (and quasi-criminal) jurisprudence.[82]

(b) Proportionality was again invoked at Step 4 (adjustment for other factors) where CU Water contends, among other things, that the financial penalty imposed is disproportionate to its net profit.[83]

(c) Finally, at Step 5 (adjustment for statutory maximum), CU Water contends that the totality principle would warrant an adjustment of the capped penalty.[84] It was further contended that CCCS had erred in not applying a percentage lower than 10% of the turnover of its business as there is no basis to apply "a benchmark or standard fine that is at the maximum of the range allowed".[85]

(d) In broad terms, CU Water submits that the most serious of the infringing acts involved a sum of S$29,5000 in an awarded contract. When compared to the figure arrived at in Step 3 and the eventual

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82 Appeal Submissions, paras 25 and 38; see also ANOA, para 42–44.

83 Appeal Submissions, para 46 and 52.

84 Appeal Submissions, para 44.

85 Appeal Submissions, para 60.

penalty imposed, it was argued that the CCCS had not paid regard to proportionality.[86]

72 CCCS, on its part, accepts that the proportionality principle, and its intrinsically associated totality principle, have a role to play when quantifying financial penalties – although the Penalty Guidelines make no express reference to proportionality (a point which we will return to).[87] That said, CCCS cautioned against directly transposing the principle of proportionality and totality principle (or sentencing approaches for that matter) as developed in the criminal and quasi-criminal caselaw context to competition cases.[88] Instead, it would be more appropriate to consider the application of the proportionality principle (and the principle of totality) within the specific context of competition cases.[89] According to CCCS, the principle of proportionality ought to be applied with reference to the twin objectives of punishment and deterrence as set out in paragraph 1.7 of the Penalty Guidelines.[90] As to the appropriate step to make adjustments for proportionality, this ought to be performed at Step 4 of the analysis. However, as no rational or realistic downward adjustment could have been made at Step 4 that would have reduced the figure derived at the end of Step 3 (where upwards adjustments of 5% were made 520 times to reflect the aggravating circumstances) to below the maximum penalty allowed under the Act, and given that the statutory maximum is less than the base penalty calculated in Step 1 for just one infringement incident,[91] CCCS proceeded to

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86 ANOA, para 44; see also Transcript, p 34 (ln 20–25) – p 35 (ln 1–19).

87 CCCS' Submissions, para 113.

88 CCCS' Submissions, para 115–16.

89 CCCS' Submissions, para 126.

90 CCCS' Submissions, para 113.

91 Transcript, pp 98–100; see also CCCS' Skeletal, para 62.

impose the maximum penalty permitted under s 69(4) of the Act. On CU Water's various criticisms of CCCS' methodology, CCCS submits that the use of a multiplier for each additional infringing incident is an accepted approach that has been applied in past cases and there is no reason to change the approach here.[92]

73 It is clear that both parties regard proportionality as a relevant consideration in the assessment of financial penalties. The parties, however, depart on:

(a) the relevance of proportionality as developed in criminal and quasi-criminal jurisprudence;

(b) the correct methodology for applying proportionality where there are multiple infringing incidents;

(c) the step in the six-step penalty framework at which proportionality ought to be considered; and

(d) whether proportionality has been properly applied in this case.

74 For the reasons which we will come to below, we agree that proportionality is relevant to the assessment of financial penalties. That said, as foreshadowed above, we were not persuaded that CCCS had erred in its assessment of the appropriate financial penalty imposed in this case and did not see it fit to adjust the penalty.

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92 CCCS' Skeletal, paras 34–35.

Applicability of criminal (and quasi-criminal) sentencing jurisprudence

75 Before we continue to address the parties' specific submissions, it is apposite that we say some words on the applicability of criminal (and quasi-criminal) sentencing jurisprudence to competition cases.

76 As we will elaborate below, CU Water seeks to rely on criminal (and quasi-criminal) cases for two purposes. First, to advance its case on proportionality (whether in the guise of the totality principle or proportionality more generally). Second, to analogise the approach adopted by sentencing courts in imposing fines to the quantification of the appropriate financial penalty under the six-step penalty framework.

77 Where it comes to the computation of financial penalties to be imposed under s 69 of the Act, sentencing principles and frameworks as developed in the context of criminal jurisprudence (and quasi-criminal jurisprudence) should be approached with circumspection and cannot be transposed wholesale into competition cases. Moreover, it is inapposite to analogise the calculation of the financial penalty under the Act with the sentencing methodology for criminal prosecutions too closely. Competition law financial penalties are not criminal sentences (or fines for that matter). They are quite different from, and should not be conflated with, specific provisions within the Act that create offences and prescribe sentences: see Part 5 of the Act.

78 In imposing a financial penalty under s 69 of the Act, CCCS is not exercising powers under a sentence-prescribing provision in relation to an offence but is exercising its powers under s 69(2)(*e*) of the Act. As noted by the Senior Minister of State for Trade and Industry at the Second Reading of the Competition Bill, the provision "empowers the Commission to impose

sanctions, such as requiring the offender to modify or terminate the agreement or conduct, pay a financial penalty, and carry out structural remedies" (emphasis added).[93] Such sanctions respond to economic and market objectives.

79 As CCCS has identified in the Penalty Guidelines, the twin objectives are: (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and (b) to ensure that the threat of the penalties will deter both the infringing undertakings and other undertakings from engaging in anti-competitive practices. In contrast, sentencing in the criminal context is undergirded by the four classical principles of sentencing; namely, retribution, deterrence, prevention and rehabilitation, which respond to wider societal interests and concerns: *PP v Kwong Kok Hing* [2008] 2 SLR (R) 684 at [17].[94]

80 We now turn to consider CU Water's submissions on Step 3 of the Penalty Guidelines. CU Water takes no issue with CCCS' analysis at Step 2 of the Penalty Guidelines (*ie*, the adjustment for the duration of the infringement).[95]

Step 3: Adjustment for aggravating and mitigating factors

81 At Step 3, the financial penalty adjusted as appropriate at Step 2 may be increased where CCCS considers there are aggravating factors or decreased where CCCS considers there are mitigating factors: see paragraph 2.13 of the Penalty Guidelines.

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93 ABA Vol 2, Tab 15, p 570.

94 ABA Vol 13, Tab 73.

95 Transcript, p 34 (ln 4).

82 CU Water contends that CCCS in its ID had erred in two ways at Step 3 of the analysis.

(a) First, CU Water takes objections to CCCS' methodology in applying a multiplier to each addition infringing incident and the manner in which CCCS had adjusted the multiplier to accord mitigating value to CU Water's cooperation.

(b) Second, CU Water contends that it ought to be regarded as operating in an industry that has high turnover and low margin which would warrant a reduction in the penalty.

CCCS' methodology of applying a multiplier to multiple infringements

83 On the first point, CU Water submits that CCCS' methodology (outlined at paragraph 15(c) above) would lead to a result that is "skewed" upwards and unfair.[96] This is because the approach of applying a 5% multiplier to each additional infringing incident offends the principle of proportionality and the totality principle.[97] Additionally, the […]% downward adjustment as applied by CCCS in this case was akin to only according mitigating weight for cooperation to two incidents out of 520 incidents.[98] CU Water points out that in the context of criminal prosecutions, mitigating value for cooperation is ascribed to the whole of the case against the accused person rather than discounting one or more

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96 Transcript, p 35 (ln 20) – p 36 (ln 5), p 37 (1n 24) – p 38 (ln 8) and p 38 (ln 15) – p 39 (ln 1)

97 Transcript, p 35 (ln 20) – p 36 (ln 5); see also ANOA, paras 49–59.

98 Transcript, p 36 (ln 15) – p 37 (ln 9); see also ANOA, para 26; see also Appeal Submissions, para 22.

charges.[99] Relying on this analogy, the adjustment at Step 3 should be calculated by multiplying the entire upward adjustment by 90%.[100]

84 Given the focus of CU Water's contention, it is apt that we begin by setting out CCCS' position on its methodology. According to CCCS:[101]

(a) At Step 1, regardless of whether the undertaking has committed a single or multiple infringements, CCCS will determine a single base penalty sum (expressed as a percentage of the undertaking's relevant turnover in the last financial year preceding the year when the infringement ended: see paragraph 2.1 of Penalty Guidelines) as opposed to a series of separate financial penalties for each individual infringing act.

(b) Step 3 adjustments for aggravating and mitigating factors are expressed as percentage upward or downward adjustments to the financial penalty sum derived after Step 2. A single percentage adjustment is generally given for each applicable category of aggravating or mitigating factor.

(c) As set out in the Penalty Guidelines, CCCS regards an undertaking that participated in multiple bid-rigging incidents as an aggravating factor, and a percentage upward adjustment will be made for each additional infringing act. Given that CCCS' methodology is premised on a base penalty sum, the application of this aggravating

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99 Appeal Submissions, para 22; see also ANOA, para 27.

100 ANOA, para 28.

101 CCCS' Submissions, paras 89–91.

factor is the only way to distinguish between an undertaking that engaged in a single incident of bid-rigging and one that engaged in multiple incidents. The precise percentage upward adjustment for this aggravating factor is derived by aggregating the fixed percentage increments for each additional infringing act.

(d) In the ID, CCCS explained that the approach of increasing penalties by a percentage multiplier for each additional instance of infringement after the first is consistent with the approach applied by CCS in *Motor Vehicle Traders* and endorsed by the Board in *Pang's Motor Trading*.[102] Before us, CCCS further submitted that the method of fixing an increment per repeated infringement has been applied across various CCCS infringement decisions involving bid-rigging conduct,[103] such as *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* (CCS 600/008/06) ("***Pest Control***") (see at [392]–[393]),[104] and *Collusive Tendering (Bid-Rigging) in Electrical and Building Works* (CCS 500/001/09) ("***Electrical and Building Works***") (see at [312]–[313]).[105]

(e) The upward and downward adjustments for each applicable aggravating and mitigating factor, once determined, are aggregated to arrive at a single percentage adjustment that is then applied to the financial penalty derived after Step 2. This method of aggregating the

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102 ID at [224] and [230].

103 CCCS' Submissions, para 91(b)(i).

104 ABA Vol 1, Tab 7.

105 ABA Vol 1, Tab 8.

aggravating and mitigating factors has also been applied in all of CCCS infringement decisions to date, including *Pest Control* (see *eg* at [399]–[402]) and *Electrical and Building Works* (see *eg* at [346]–[349]).

85 As mentioned at paragraphs 20 to 21 above, the Board will generally accord CCCS a margin of appreciation in its determination of financial penalties and have regard to the Penalty Guidelines, unless it is shown that the Penalty Guidelines are wrong or that the CCCS has erroneously applied the Penalty Guidelines, or that the Board is not satisfied that on the whole, the penalty imposed is just and proportionate. CU Water faced the uphill task of persuading us that the approach as adopted by CCCS was wrong and that a different approach should have been adopted which would have yielded a result that would not have exceeded the statutory maximum. We were not satisfied that the CCCS' methodology was wrong or that it had misapplied the Penalty Guidelines.

86 We accept CCCS' submission that its methodology in this case is consistent with the methodology it had adopted in previous cases. We should also point out that CCCS had applied the same methodology in quantifying the penalties imposed on Crystalene and Crystal Clear. In both instances, CCCS applied a multiplier for each additional infringing incident and the financial penalties as adjusted at Step 3 had exceeded the maximum penalty permitted under the Act. But unlike in CU Water's case, Crystalene and Crystal Clear were granted further leniency discounts and adjustments for participation in the Fast Track Procedure at Step 6: for Crystalene, see [195]–[203] of the ID; for Crystal Clear, see [208]–[216].

87 In contrast, CU Water has been unable to provide a coherent and principled alternative methodology. CU Water's base financial penalty as

derived at Step 1 (without any multiplier applied) was already in excess of the statutory maximum penalty. Even on CU Water's case, the adjusted financial penalty at the end of Step 3 would have come up to S$[…], not all that different from the financial penalty determined by CCCS before taking into account section 69(4) of the Act. While CU Water attempted to suggest other possible approaches,[106] these were not seriously argued. In the end, despite CU Water's misgivings with CCCS' methodology, when asked for an alternative methodology to be applied at Step 3 which would yield a materially different outcome, counsel for CU Water declined to suggest "what the new or proper formula should be".[107]

88 It is sufficient from the foregoing that we dismiss CU Water's objections to CCCS' methodology. Having said that, for the sake of completeness, we address the specific arguments raised.

89 According to CU Water, as competition infringements are quasi-criminal in nature and penalties akin to fines, the principle of proportionality and the totality principle as used in criminal sentencing should similarly apply.[108] Here, the application of the multiplier resulted in a penalty that was disproportionate as it was magnitudes greater than the value of the most serious of the offending acts (which according to CU Water is S$29,500, being the highest value of the awarded contracts pursuant to the infringements). There was also some suggestion that the post-multiplier penalty was crushing.[109]

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106 Transcript, p 38 (ln 21) – p 39 (ln 1).

107 Transcript, p 38 (ln 15–20).

108 Appeal Submissions, paras 39 and 62.

109 Transcript, p 35 (ln 18) – p 36 (ln 5); Appeal Submissions, paras 38–40.

90 CU Water reliance on the principle of proportionality and the totality principle as developed in the context of criminal and quasi-criminal jurisprudence is misplaced for the reasons we have stated at paragraphs 77 to 79 above. More to the point, CU Water relies on the definition of the totality principle as set out in the case of *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("***Shouffee***").[110] In *Shouffee*, the totality principle was explained as "a principle of limitation and is a manifestation of the requirement of proportionality that runs through the gamut of sentencing decisions": at [47]. The principle has two limbs. First, a cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, and second, if its effect is to impose on the offender a crushing sentence not in keeping with the offender's record and prospects: at [53]–[54] and [57]. The short point is that financial penalties imposed under the Act are not criminal fines. It is inapposite to extrapolate sentencing principles and apply them out of context to competition cases. Indeed, there are no "normal level of sentences for the most serious of the individual offences involved" or "offender's records and prospects" to measure against.

91 This is not to say that proportionality (whether manifested as the totality principle or more broadly conceived) is irrelevant to the calculation of the appropriate financial penalty. After all, as mentioned at paragraph 21 above, the Board must still be satisfied that the penalty imposed is just and proportionate. However, in considering proportionality, the Board must consider the principle in its appropriate context.

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110 ABA Vol 2, Tab 13.

92 As to CU Water's reliance on the approach taken to mitigation in sentencing, it is inapposite to analogise the calculation of the financial penalty under the Act with the sentencing methodology for criminal prosecutions too closely. In the criminal context, the sentencing judge is required to decide on the appropriate individual sentence in respect of each charge. In arriving at the individual sentences, the sentencing judge will generally have considered the relevant aggravating and mitigating factors that bear upon each discrete sentence. CCCS' methodology for infringements involving multiple bid-rigging incidents does not attempt to impose separate financial penalties for each infringement. Instead, a percentage upward adjustment is made to a single base penalty sum derived after Step 2 to reflect the severity of the undertaking's conduct.

High turnover and low margin

93 As to CU Water's other contention at Step 3, CU Water argues that CCCS ought to have concluded that it belonged to an industry where there is high turnover and low profit margins, thereby warranting a further reduction of the penalty.[111]

94 In *Bees Work*, the Board recognised the fact that an undertaking that operates in a high turnover and low margin industry could be a mitigating factor which warrants a reduction in financial penalties: at [131]–[137] and [162].[112] This is because where the industry operates in such a way that a significant portion of an undertaking's turnover comprise monies paid over to other independent parties (*ie*, low margin), the absolute turnover of an undertaking

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111 ANOA, para 49–59; see also Appeal Submissions, paras 23–24.

112 ABA Vol 1, Tab 6.

may cease to be a useful indicator of an undertaking's economic presence and/or financial strength, and a penalty based on a percentage of that turnover can be disproportionately high compared to an undertaking operating in an industry where margins are typically higher: *IPP Financial Advisors* at [68].[113] That said, the undertaking must demonstrate that the *nature of the industry* is such that a *significant portion* of the gross revenue earned is not retained but passed on to other independent parties: *IPP Financial Advisors* at [70].

95 We venture further. As the ID notes, CU Water did not make any representations or provide any evidence on the proportion of its turnover that consisted of "monies passed through" to independent third parties.[114] This was a crucial omission. Even if the industry as a whole were an industry with high turnover and low profits by reason of "monies passed through" to third parties, it was for CU Water to demonstrate that it was in the position of a normal player in the industry.

96 CU Water referred to the financial statements (for financial years ("**FY**") 2011 to 2019) exhibited in its written representations to CCCS dated 8 June 2020. Based on these statements, CU Water argues that an average of 43.28% of the gross revenue were "monies passed through", which is to be regarded as significant.[115] It is, however, unclear which line items in the eight years' worth of financial statements CU Water considers to be "monies passed through" to independent third parties. Without detailed submissions, the Board is in no position to properly assess which sums were "monies passed through" to

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113 ABA Vol 12, Tab 63.

114 ID at [235] and [237].

115 ANOA, paras 53–55; see also Appeal Submissions, para 24.

independent third parties. While CU Water argues that costs incurred in procuring supplies, chemical costs, freight inwards and testing charges[116] should be regarded to be "monies passed through", these appear to be operational expenses. Without more, such expenses should not be considered in the determination as this would lead to the perverse result of penalising more efficient undertakings that have lower overheads: see also the Board's reasoning in *IPP Financial Advisers* at [70].

97 Even if CU Water's calculations were accepted, based on the figures CU Water had presented to us, it is noted that the percentages of "monies passed through" for FYs 2011 to 2019 have steadily been declining year-on-year from 53.6% to 36.9%.[117] If the nature of CU Water's industry were indeed characterised by significant proportions of monies being "passed through", one would expect to see the percentages of such "monies passed through" to be more consistent.

Step 4: Adjustment for other factors

98 We come now to CU Water's arguments as regards Step 4 of the analysis. As before, CU Water again invokes proportionality. It contends that the financial penalty ought to be reduced at Step 4 to be commensurate with its size and financial position, relying on its net profits as a barometer. According to CU Water, the penalty of S$308,680 (which is the eventual ultimate penalty imposed but curiously referred to by CU Water at Step 4) is almost 300% of the net profit after tax on its most profitable financial year and should be regarded

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116 ANOA, para 54.

117 ANOA, para 54.

as excessively disproportionate to its financial position.[118] The penalty would also likely irretrievably jeopardise the economic viability of the business leading to its winding up.[119]

Adjustment for proportionality at Step 4

99 As set out at paragraph 72 above, CCCS accepts that proportionality has a role to play in the quantification of penalties and submits that adjustments for proportionality should be made at Step 4.

100 According to the Penalty Guidelines, at Step 4, the financial penalty may be adjusted by CCCS applying an uplift, on a case-by-case basis, to achieve the policy objectives outlined in paragraph 1.7 of the Penalty Guidelines, and in particular, to deter the undertakings concerned as well as other undertakings from engaging in anticompetitive practices: see paragraph 2.17 of the Penalty Guidelines. In determining whether to impose an uplift, CCCS may consider an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains which might accrue to the undertaking in other product or geographic markets as well as in the market may be considered: see paragraph 2.18 of the Penalty Guidelines.

101 We note, however, that the Penalty Guidelines are silent on the principle of proportionality – what it means, when and how it should be applied. Step 4 of the Penalty Guidelines, which is effectively the last substantive step in the

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118 Appeal Submissions, paras 45–46 and 52.

119 Appeal Submissions, para 54.

penalty assessment before adjustments for the statutory maximum and other immunity, leniency or fast-track procedures are made, only explicitly addresses of uplifts and not downward adjustments.

102 This is unlike the CMA Penalty Guidance, which expressly spells out adjustments for proportionality, and acknowledges the possibility of a decrease in the penalty: see Step 5 of the CMA Penalty Guidance. In particular:

> ***Assessment of whether the penalty is proportionate***
>
> *2.25 The CMA will take a step back to check whether, in its view, the overall penalty reached after steps 1 to 4 is proportionate 'in the round'. The assessment of proportionality is not a mechanistic assessment, but one of evaluation and judgement. The CMA is not restricted to imposing the lowest penalty that could reasonably be justified and it will select the figure which it considers is appropriate in the circumstances of the case. Where necessary, the penalty may be decreased to ensure that the level of penalty is not disproportionate.*
>
> *2.26 In carrying out the overall assessment of whether a penalty is proportionate, the CMA will have regard to all relevant circumstances including the nature of the infringement, the role of the undertaking in the infringement, the impact of the undertaking's infringing activity on competition, and the undertaking's size and financial position. The overall assessment should appropriately reflect the seriousness of the infringement and the need sufficiently to deter both the infringing undertaking and other undertakings from engaging in anti-competitive activity.*
>
> *2.27 A penalty may be proportionate even if it exceeds the statutory cap. However, if that is the case, a further adjustment will be needed, as set out below.*

103 Having said the above, it does not appear from paragraphs 2.17 and 2.18 of the Penalty Guidelines that the adjustment for other relevant factors is subject to a closed and exhaustive set of considerations. Indeed, CCCS accepts that

proportionality (and its intrinsically associated principle of totality) has a role to play when quantifying financial penalties.[120]

104 CCCS' position before us is that any adjustment on account of proportionality ought to be applied at Step 4 of the analysis. This is the appropriate step to apply proportionality because adjustments at Step 5 – on account of the statutory maximum penalty in section 69(4) of the Act – serve a different purpose; namely, to avoid the imposition of an excessive burden on the infringing undertaking. Further, factors that have been considered at Steps 1 to 3 (*eg*, duration of the infringement, or the role played by the infringing undertaking) should not be re-treaded at Step 4 (*ie*, an assessment of proportionality does not entail that the calculations done at Steps 1 to 3 need to be recalculated).[121]

105 As to its content, CCCS submits, among others, that proportionality ought to be applied with reference to the twin objectives of punishment and deterrence as set out at paragraph 1.7 of the Penalty Guidelines. In this regard, proportionality ensures that the amount of financial penalty is no higher or lower than is necessary to satisfy the twin objectives of punishment and deterrence.[122] Proportionality also serves as a "last look" to ensure that the twin objectives of punishment and deterrence are accounted for after all relevant factors pertaining to the infringing undertaking's conduct have been considered.[123]

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120 CCCS' Submissions, para 113.

121 CCCS' Submissions, para 113.

122 CCCS' Submissions, para 113.

123 CCCS' Submissions, para 113.

106 Having said the above, on the specific facts of the present case, CCCS submits that there was no need for an evaluation of proportionality at Step 4 as the base financial penalty of S$309,312 was already in excess of the statutory maximum penalty capped at Step 5.[124] In effect, the ultimate financial penalty of S$308,680 imposed on the Appellant barely reflects a single instance of bid-rigging (as derived at Step 1) and does not even account for CU Water's other 520 bid-rigging infringements.[125] Bearing in mind the twin objectives of punishment and deterrence, no rational application of the proportionality principle could have reduced the penalty (at the end of Step 4) to below the statutory maximum penalty that would have capped the infringing party's liability for financial penalties (in Step 5).[126]

107 As alluded to above, CCCS is accorded a margin of appreciation in the interpretation and application of the Penalty Guidelines. Even though these guidelines make no specific mention of the proportionality principle, either in Step 4 of the penalty calculation framework or anywhere else in the Penalty Guidelines, it is unobjectionable for this principle to be integrated into this stage of its analysis of the financial penalty to be imposed on an undertaking that has committed multiple infringing acts. Without actually endorsing CCCS' position as outlined at paragraphs 104 to 106 above, the Board is ultimately satisfied that CCCS had duly considered proportionality but took the position that no application of the proportionality principle could have resulted in a figure that was anything less than the statutory maximum, and thus did not feel the need to make adjustments at Step 4 for proportionality. In particular, we note that CCCS

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124 CCCS' Submissions, para 146.

125 CCCS' Submissions, para 146.

126 Transcript, p 98 (ln 10–16).

had considered CU Water's financial position, including CU Water's financial statements for FYs 2016 to 2019, GST F5 filing forms for 2018 and 2019, information on its uncollected debts as at 31 October 2020, information on any one-off large sum payment committed to be paid up to 31 March 2021, and revenue and estimated net profits for the months of January to June 2020. Based on CCCS' assessment, CU Water had not shown that payment of the eventual financial penalty of S$308,680 would have threatened the continued viability of the business.[127]

CU Water's financial position and economic viability

108 Turning to CU Water's submission that CCCS had erred insofar as it did not accord weight to its net profits and losses. According to CU Water, the penalty of S$308,680, which is almost 300% of the net profit after tax on CU Water's most profitable financial year in the period between 2016 to 2019, is excessively disproportionate to CU Water's financial position when net profits and losses are considered.[128] In this regard, CU Water relies on its financial figures for four years:[129]

FY	**Revenue (S$)**	**Profit/(Loss) before Tax (S$)**	**Profit/Loss less Tax (S$)**
2016	[…]	[…]	[…]
2017	[…]	[(…)]	[(…)]

127 ID at [245]–[248].

128 Appeal Submissions, paras 46 and 52.

129 Appeal Submissions, para 50.

2018	[…]	[(…)]	[(…)]
2019	[…]	[(…)]	[(…)]

109 While the Board may consider an undertaking's profits in its determination of the overall appropriateness of the penalty, the Board is also entitled to look at its expenses: *Transtar Travel Pte Ltd and another v CCS* [2011] SGCAB 3 at [98].[130] In certain business, the net profits may not be an accurate indicator of the financial health of an undertaking, as there are various other factors or reasons which impact its profitability.

110 CU Water has been reporting straight losses from 2017 to 2019, with 2018 being the most significant. It is important to examine why this is the case, seeing as the revenue appears to be consistently in the region of S$3m for those years and the company appears to be a going-concern to date, having survived through the COVID-19 pandemic.

111 Across all three FYs, apart from purchases and related costs, employee benefits were a significant expenditure. In this regard, the notes to the financial statements for each of the relevant FYs consistently record that in respect of employee compensation, "the Company [has] had significant transactions with related parties".[131] These related parties include a person or close member of that person's family who has tight control or joint control, or significant influence

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130 ABA Vol 14, Tab 86.

131 For FY 2017 see ABD Vol 1, p 329; for FY 2018 see ADB Vol 1, p 354; for FY 2019 see ADB Vol 1, p 384.

over CU Water, or is a member of the key management personnel of CU Water.[132]

Year	**Revenue (S$)**	**Employee benefits (S$)**	**Key management compensation (related parties) (S$)**
2017	[…]	[(…)][133]	[(…)][134]
2018	[…]	[(…)][135]	[(…)][136]
2019	[…]	[(…)][137]	[(…)][138]

112 The negative profitability appears to be the result of significant payments to key management personnel who were related parties (which in this case were the directors). In the absence of these payments, CU Water would have in fact reported healthy net profits. The net profits therefore are not a useful marker of CU Water's financial position for the purposes of calculating the penalties.

113 In a similar vein, CU Water's submission on the economic viability of the business if it were made to pay the eventual financial penalty is rejected.

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132 See for *eg*, ABD Vol 1, p 324.

133 See ABD Vol 1, p 314.

134 See ABD Vol 1, pp 329 and 334.

135 See ABD Vol 1, p 339.

136 See ABD Vol 1, pp 354 and 359.

137 See ABD Vol 1, p 364.

138 See ABD Vol 1, pp 384 and 389.

According to CU Water, approximately 50% of its revenue consistently goes towards employee benefits each financial year. Thus, according to CU Water, a financial penalty of 10% of its revenue would cause its cashflow to suffer and likely result in CU Water having to cut costs by retrenching manpower and labour to sustain its business. As CU Water's business is labour intensive, retrenching labour will result in lower capacity to take up jobs leading to a downward spiral of its business.[139] However, it is not inconceivable that the business could remain viable if payments similar to those made to directors in previous years were reduced. There is also no credible suggestion that CU Water would not be able to meet its current liabilities as they fall due on top of having to pay the penalty.

114 In any event, under paragraph 4 of the Competition (Financial Penalties) Order 2007, CCCS is empowered to grant an instalment plan to an undertaking on whom a financial penalty imposed. CCCS had brought this option to CU Water's attention in its cover letter when it served the ID.[140] We further understand that CCCS is prepared to accommodate and extend an appropriate instalment plan to CU Water.[141] This should offer some comfort, if any is required, to CU Water.

Step 5: Adjustment to prevent maximum penalty being exceeded

115 We come to the final ground of appeal.

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139 Appeal Submissions, paras 54 and 56.

140 ADB Vol 3, p 45.

141 Transcript, pp 120–121.

116 Under s 69(4) of the Act, the amount of the financial penalty imposed may not exceed 10% of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years ("**total turnover**"). The total turnover of the business of the undertaking in Singapore for the purposes of s 69(4) of the Act is defined in the Competition (Financial Penalties) Order 2007 as the applicable turnover for the business year preceding the date on which the decision of CCCS is taken, or if the figures are not available for that business year, the previous business year.

117 It is apt to note that the total turnover for the purposes of Step 5 is different from the turnover considered at Step 1, which is the turnover of the undertaking in Singapore *for the relevant product and geographic market affected by the infringement*: see paragraph 2.1 of the Penalty Guidelines. In other words, the total turnover is the turnover of the undertaking's business as a whole.

118 Here, the financial penalty up to Step 4 resulted in a figure which exceeded the maximum penalty that CCCS can impose under the Act (*ie*, S$[…]). Accordingly, the financial penalty was adjusted downwards to S$[…].[142] CU Water does not disagree with CCCS' calculation of the statutory maximum penalty. Instead, CU Water's contention is that s 69(4) of the Act does not make it mandatory for financial penalties to be capped at 10% and should instead be interpreted as giving the authority a discretion to impose financial penalties in the range of 1% to 10% of the total turnover.[143] In further support of this contention, CU Water analogises the imposition of financial penalties with

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142 ID at [253].

143 ANOA, paras 64–66; see also Appeal Submissions, para 59.

fines, and contends that "maximum sentences" are meant for the most egregious of conduct and that CU Water's conduct "can hardly be said to be the most egregious on a scale of severity".[144] According to CU Water, the appropriate percentage for this case is submitted to be 3%.[145] This is based on the mid-point of the profit after tax margin between -1% to 7%.[146]

119 CU Water's contention must be rejected.

120 Section 69(4) of the Act reads:

> (4) No financial penalty fixed by the Commission ***under this section*** may exceed 10% or such other percentage of such turnover of the business of the undertaking in Singapore for each year or infringement for such period, up to a maximum of 3 years, as the Minister may, by order published in the Gazette, prescribe.
>
> [emphasis added]

121 By the words of the provision, it is clear that s 69(4) of the Act is not to be read alone but with the other provisions "under this section". In this regard, CCCS' discretion to fix financial penalties are set out in s 69(2)(*e*) of the Act:

> (2) A direction referred to in subsection (1) may, in particular, include provisions —
>
> …
>
> (*e*) where the decision is that any agreement has infringed the section 34 prohibition, any conduct has infringed the section 47 prohibition or any merger has infringed the section 54 prohibition, to pay to the Commission such financial penalty in respect of the infringement as the Commission may determine; and

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144 Appeal Submissions, para 63.

145 Transcript, p 44.

146 Appeal Submissions, para 64.

122 Where CCCS has determined that any agreement has infringed s 34 of the Act, CCCS has the power to determine and impose financial penalties on undertakings pursuant to s 69(2)(*e*) of the Act. Depending on the facts of each case, the quantum of financial penalties determined by CCCS may either come within or exceed the statutory maximum stated in s 69(4) of the Act. Where that statutory maximum is exceeded, s 69(4) of the Act then operates to curtail the CCCS' discretion to impose financial penalties accordingly. This has been duly translated into the six-step framework in the Penalty Guidelines.

123 As alluded to at paragraph 101 above, Steps 1 to 4 of the Penalty Guidelines set out the substantive considerations in quantifying the appropriate penalty. Step 5 builds into the analysis the statutory maximum but this comes after CCCS has already quantified the financial penalty based on the preceding steps. Similarly, the Step 6 adjustments are adjustments for certain immunities, reductions and discounts extraneous to the substantive considerations that feature in Steps 1 to 4 of the Penalty Guidelines that go toward the quantification of the penalty.

124 CU Water's interpretation of s 69(4) of the Act effectively introduces a further discretion to recalibrate the financial penalty at Step 5 of the analysis albeit in the range of 1% to 10% of the total turnover. This is incorrect. Quite apart from doing violence to the language and structure of s 69 of the Act, adopting CU Water's approach would render otiose Steps 1 to 4 of the Penalty Guidelines and introduce uncertainty and arbitrariness. The arbitrariness introduced by CU Water's argument is even more apparent when we consider alternative scenarios where Steps 1 to 4 yield a figure that is below the statutory maximum. By CU Water's interpretation, it would be open to CCCS to abandon the financial penalty as calculated at Steps 1 to 4 in favour of a figure that is anything between 1% to 10% of the total turnover. In this regard, CU Water has

offered no principled formula or matrix to arrive at the appropriate percentage in the range of 1% to 10% save to suggest a figure of 3%, which is based on the mid-point of the profit after tax margin for CU Water. Moreover, when asked at the hearing if there were cases in which the statutory maximum had been exceeded but CCCS (or the Board for that matter) nonetheless reduced the penalty to less than 10%, CU Water was unable to do so.[147] This disposes CU Water's arguments on Step 5 of the analysis. Nonetheless, for completeness, to the extent that CU Water seeks to analogise the imposition of financial penalties to fines, this is inapposite for the reasons we have given above.

125 Accordingly, the Board sees no basis to exercise its discretion to adjust the financial penalty imposed by CCCS.

Conclusion

126 In closing, an appeal to this Board against CCCS' decision on the quantum of financial penalty should not simply rest on the appellant's view that the amount is excessive. Undertakings who seek to appeal against the quantum of the financial penalties imposed by CCCS for infringing the substantive prohibitions of the Act should be prepared to either: (a) demonstrate how and why the principles employed by CCCS under its financial penalty calculation framework are incorrect or produce unjust results; or (b) establish any errors made by the CCCS in the interpretation or application of these penalty calculation principles that have resulted in higher financial penalties than would have been arrived at if these principles had been correctly applied. In either case, the appellant should be able to show how a lower penalty figure would have been arrived at if the correct principles had been properly applied, rather than

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147 Transcript, pp 45–46.

simply proposing a lower quantum with the bare assertion that this figure would be sufficient to satisfy the punitive and deterrent objectives of the CCCS.

127 In this case, we are satisfied that the eventual penalty imposed on CU Water (*ie*, S$308,680) was appropriate. For the above reasons, we dismiss the appeal, with costs to be paid by CU Water to CCCS, save as provided in any cost orders previously made. Parties are to agree on the quantum of costs, failing which parties are to file their respective submissions within 21 days from the date of this decision.

Dated this 3rd day of October 2023.

Andre Yeap *SC*	Tan Chuan Thye *SC*	Burton Ong	Julian Wright
Chairman	Member	Member	Member